Supreme Court, U.S.

(1)

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No. ____

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In The

Supreme Court of the United States

DONOVAN A. MUSCHETTE,

Petitioner,

v.

J.L. SIVLEY, WARDEN, FCI TALLADEGA; R.S. MEEKS, ASSOCIATE WARDEN, FCI TALLADEGA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DONOVAN A MUSCHETTE, *Pro-se*
R/N # 44693-019
P.O. Box 5000
Yazoo City, Mississippi
39194-5000

8298

QUESTIONS PRESENTED

I. Whether or not a prisoner should have exhausted administrative remedies through prison administrative remedy process when seeking compensatory and punitive damages under *42 U.S.C. §1997e (Supp. 1998) Suits by prisoners.*

II. Whether or not Petitioner should have been granted leave to amend complaint under *Federal Rules of Civil Procedure Rule 15.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Donovan A. Muschette,

Petitioner,

vs.

J.L. Sivley, Warden, R.S. Meeks, Associate Warden,
Respondents.

Pursuant to Supreme Court, Rule 14, undersigned Petitioner certifies that the following is a complete list of all the parties who have interest in the outcome of this case:

James H. Hancock	Judge, U.S. District Court
Carnes	Judge, U.S. Circuit Court
Tjoflat	Judge, U.S. Circuit Court
Marcus	Judge, U.S. Circuit Court
Thomas K. Kahn	Clerk, U.S. Circuit Court
Perry D. Mathis	U.S. Circuit Court
R.S. Meeks	Associate Warden, Talladega
Bill Pryor	U.S. Circuit Court
J.L. Sivley	Warden FCI Talladega
Donovan A. Muschette	Petitioner

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT – Continued

THERE ARE NO CORPORATE INTEREST FOR PURPOSE OF DISCLOSURE

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DECISION BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is not published. A copy is attached as Appendix A to this petitioner (A.1). The ORDER of the United States District Court for the Northern District of Alabama is not published. A copy is attached as Appendix A to this petition (A.2).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 23, 2001. A copy of that Order is attached as Appendix A to this petition (A.1). Jurisdiction is conferred on the Supreme Court by Title 28 U.S.C. §1254(1), that the Supreme Court may review virtually any decision of a Federal Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the *Prisoner Litigation Act (PLRA)* 42 U.S.C. §1997e.

Suits by Prisoners:

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or

other correctional facility until such administrative remedies as are available are exhausted.

Notes of Decision 42 U.S.C. §1997e (Supp. 1998)

Note 20. Exhaustion of remedies-Damages

The exhaustion of administrative remedies requirement of the Prison Litigation Reform Act did not apply to inmate claims for compensatory and punitive damages, where monetary relief was not available under state's inmate grievance procedure. *White v. Fauver,* D.N.J.1998, 19 F.Supp.2d 305.

This case also involves *Federal Rules of Civil Procedure*:

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires so. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

This case also involves *Amendment XIV to the United States Constitution* which provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provision of this article.

Amendment V to the United States Constitution: requires the Federal Government to obey the same Equal Protection standards involved in Amendment XIV. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2, 95 S.Ct. 1225 (1975).

The Amendment is enforced by Title 42, Section 1983, United States Code:

> Every person who under color of any statute, ordinance, regulation, custom, or usage of any State, Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Sometime in June 1996, Petitioner Donovan A. Muschette inquired in F.C.I. Talladega Education Department about instructing a continuous education course in African History that he taught prior at Federal Prison Camp Maxwell. Petitioner was denied the opportunity to instruct the class by Associate Warden Meeks, stating that "no cultural classes were being taught and inmates don't instruct classes at F.C.I. Talladega." Petitioner Muschette verbally spoke to Meeks about his prejudicial act when he found Meeks' statement untruthful. Muschette explained to Meeks he would use BOP Administrative Remedies to resolve this issue. Meeks stated "oh you don't want to do that" (Doc. 1-pg. 17).

From October 29, 1996 to November 18, 1996, Petitioner Muschette was sent to administrative detention pending investigation. Petitioner Muschette was never given a reason or a write up of charges after several inquiries. Finally, after 18 days in administrative detention Petitioner Muschette was told he would be transferred to F.C.I. Fort Dix, his transfer to Fort Dix never materialized (Doc. 1 pg. 15 & 21).

On November 21, 1996 Petitioner Muschette was transferred to U.S.P. Atlanta and remained there for a total of 40 days on 22 1/2 hrs. lockdown (Doc. 1 pg. 15 & 21).

On December 30, 1996, Petitioner Muschette was transferred again to Atlanta City Detention Center, a

pre-trial holding facility for reason unbeknownst to him (Doc. 1 pg. 21).

While in Atlanta City Detention Center, Petitioner Muschette called his family members and friends to inquire about his placement in a city jail. Petitioner Muschette also wrote Atlanta Regional Office inquiring about his placement in ACDC only to be disregarded (Doc. 1 pg. 26). Petitioner also inquired about Administrative Remedies Forms only to be disregarded (Doc. 1 pg. 26).

April 2, 1997 Petitioner Muschette was transferred to U.S.P. Atlanta after spending approximately 3 months in ACDC (Doc. 1 pg. 27).

April 7, 1997 Petitioner Muschette was transferred back to F.C.I. Talladega Administrative Detention (Doc. 1 pg. 30).

April 9, 1997 Petitioner Muschette was released from administrative detention and was finally placed back in population after approximately 6 months (Doc. 1 pg. 31).

April 15, 1997 Petitioner Muschette was placed back in administrative detention for reasons unbeknownst to him (Doc. 1 pg. 32).

April 22, 1997 Petitioner Muschette was released back to population (Doc. 1 pg. 35).

Petitioner Muschette filed prisoner Civil Rights Complaint CV-97-H-1499-E, June 20, 1997 against J.L. Sivley et al., U.S. District Court for the Northern District of Alabama asserting 36 claims against 14 defendants (Doc. 1). In a December 9, 1997 REPORT AND RECOMMENDATION, Chief Magistrate Judge T. Michael Putnam recommended that all of Petitioner's claims against defendants

be dismissed, except his Equal Protection Claim against defendant R.S. Meeks, Associate Warden, and his Condition of Confinement claims against all defendants, Henry E. Hudson, Lyn H. Duncan, William Campbell, Tom Pocock, and Beverly Harvard (Claims 10, 11, and 12); Chief Magistrate Judge T. Michael Putnam recommended that claims 10, 11, and 12 be SEVERED from the action and TRANSFERRED to U.S. District Court for the Northern District of Georgia for proceedings (Doc. 11). Petitioner Muschette filed NOTICE OF OBJECTIONS on December 28, 1998 to Magistrate Judge's Report and Recommendation (Doc. 12); said Notice was DENIED in U.S. District Court Atlanta (by Magistrate Judge T. Michael Putnam) February 26, 1999 (Doc. 15). In said ORDER dated February 26, 1999 Senior Judge James H. Hancock ADOPTED and ACCEPTED Magistrate Judge's Recommendation to accept Equal Protection claim against Associate Warden Meeks, (Claim 1) and the Condition of Confinement claims against defendants Hudson, Duncan, Pocock, Campbell and Harvard (Claims 10, 11, and 12). It was further ORDERED (1) that claim 1 is referred to magistrate judge for further proceedings in the U.S. District Court of Alabama and that (2) claims 10, 11, 12 be SEVERED from this action and those claims TRANSFERRED to the U.S. District Court for the Northern District of Georgia for further proceedings (Doc. 15). March 15, 1999 Petitioner Muschette filed OBJECTIONS and ORDER of DISMISSAL, SEVERED, and TRANSFERRED claims (Doc. 18). March 23, 1999 ORDER that Petitioner Muschette Motion for Reconsideration of Judgment and Amendment of Complaint is DENIED (17-1); Petitioner objections are OVERRULED (18-1) filed (by Judge James

H. Hancock) (Doc. 20). March 2, 1999 ORDER that Petitioner Muschette is to show cause as to why this action should not be dismissed without prejudice so he might exhaust administrative remedies (by Magistrate Judge T. Michael Putnam) (Doc. 16). March 31, 1999 RESPONSE by Petitioner Muschette to ORDER TO SHOW CAUSE (Doc. 21). July 25, 2000 Report and Recommendation (SECOND) filed (by Magistrate Judge T. Michael Putnam) that sole remaining claim in this action, denial of Equal Protection against Associate Warden Meeks, be DISMISSED WITHOUT PREJUDICE due to Petitioner's failure to exhaust administrative remedies (Doc. 23). August 10, 2000, OBJECTIONS filed by Petitioner Muschette to REPORT AND RECOMMENDATION (SECOND) (Doc. 24). August 17, 2000, MEMORANDUM OF OPINION accepting and adopting REPORT AND RECOMMENDATION (23-1) filed (by Judge James H. Hancock) (Doc. 25). August 17, 2000 ORDER (Final Judgment) filed (by Judge James H. Hancock) that in accord with MEMORANDUM OF OPINION entered contemporaneously, Petitioner's sole claim is DISMISSED WITHOUT PREJUDICE due to Petitioner's failure to exhaust administrative remedies (Doc. 27). September 19, 2000 ORDER regarding Appeal in Prisoner Civil Rights case, filed (by Judge James H. Hancock) (Doc. 28). September 21, 2000 Notification by Çircuit Court of Appellate docket number (Doc. 28). October ___, 2000, Petitioner Muschette submit BRIEF OF APPELLANT to the United States Court of Appeals for the Eleventh Circuit. February 23, 2001 ORDER from Circuit Court Judge's TJOFLAT, CARNES AND MARCUS, IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, AFFIRMED

the decision of the United States District Court for the Northern District of Alabama, Petitioner's failure to exhaust administrative remedies under 42 U.S.C. §1997e, when seeking a Bivens claim and March 23, 1999, ORDER that the court gave Petitioner leave to amend his complaint.

BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of *Prison Litigation Reform Act (PLRA)* 42 U.S.C. §1997e, a question of interpretation of the *Fourteenth and Fifth Amendment to the United States Constitution* and a question of interpretation of *Federal Rules of Civil Procedure Rule 15, Amended and Supplemental Pleadings*. The district court had jurisdiction pursuant to *Title 48 U.S.C. §3231* and the circuit court of appeals had jurisdiction pursuant to *Title 28 U.S.C. §1291.*

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Conflicts with Decisions of Other Courts

The holding of the courts below that prisoner Bivens claim was dismissed on the grounds that he failed to exhaust administrative remedies under *Prison Litigation Reform Act (PLRA)* 42 U.S.C. §1997e, is directly in contrary to the majority holdings of the lower courts in *Garrett v. Hawk*, 127 F.3d 1233 (10th Cir. 1997); *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998); *Lunsford v. Jumao-As*,

139 F.3d 1233 (9th Cir. 1998); *Jackson v. Detella*, 998 F.Supp. 904 (N.D. Ill. 1998); *McCarthy v. Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992); *Russo v. Palmer*, 990 F.Supp. 1047, 1050 (N.D. Ill. 1998); *Polite v. Babarin*, 1998 WL 1466687* 2 (S.D.N.Y. March 25, 1998). Those cases should be followed making the exhaustion requirement inapplicable to petitioner's complaint which seeks only monetary damages, warranting a reversal.

Also under the *Federal Rules of Civil Procedure Rule 15*, a party may amend a pleading. The holding of the courts below did not grant Petitioner leave to amend Complaint. On ORDER dated March 23, 1999, there was no mention of leave GRANTED to amend complaint *Appendix A. (A.3).*

B. Importance of the Questions Presented

This case presents a fundamental question of the interpretation of *Title 42 U.S.C. §1997e* (Supp. 1998). The question presented is of great importance because it affects the judiciary decisions of all lower courts in all fifty states, the District of Columbia, and also the operation of prison systems throughout the United States of America. In view of the amount of prisoner law suits, guidance on the question is also of great importance to the judiciary of the Supreme Court. In addition, the question is of great importance to prisoners because it affects their ability to pursue litigation when seeking punitive and compensatory damages.

The issue's importance is enhanced by the fact that the lower courts in Petitioner's case have seriously misinterpreted *Title 42 U.S.C. §1997e* (Supp. 1998) *Prison*

Litigation Reform Act (PLRA). The district and the appellate court held that Petitioner had to exhaust all administrative remedies prior to a *Bivens Action* under 42 U.S.C. §1997e:

> No action shall be brought with respect to prison conditions under Section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are ***available*** are exhausted.

Petitioner Muschette argues that initially he attempted to resolve the issue through administrative remedies with Associate Warden Meeks in good faith and was placed in administrative detention without being given a set of charges and remained in transit for six months. After returning from transit, Petitioner filed his complaint to the district court for punitive and compensatory damages *Russo v. Palmer*, 990 F.Supp. 1047 (N.D. Ill. 1998). Petitioner Muschette argues that because his complaint seeks exclusively monetary damages and monetary damages are ***unavailable*** through the Bureau of Prisons administrative remedy program, there are no administrative remedies for him to exhaust; thus *42 U.S.C. §1997e* does not bar his claim with respect to monetary relief.

The question remains, however, whether Congress intended to require a federal prisoner who is seeking exclusively monetary damages to pursue administrative remedies when and if there are no administrative remedies that are **"available"** that would permit recovery of monetary damages.

Garrett v. Hawk, 127 F.3d 1263 (10th Cir. 1997), held that §1997e does not require a federal prisoner seeking exclusively monetary relief to pursue administrative remedies prior to filing a claim against prison officials. The court reasoned that Congress did not intend to require exhaustion of **unavailable** remedies survived in plain language of the amended statute 42 U.S.C. §1997e (Supp. 1998), *McCarthy v. Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992).

In *Underwood v. Wilson*, 151 F.3d 292 (5th Cir. 1998), the court examined whether administrative remedy was **"available"**. The court held that a remedy is **"available"** when it can be availed "for the accomplishment of a purpose" or "is accessible or may be obtained." *Id. (quoting Webster's New International Dictionary*, 150 (3d ed. 1981)). When terms used in a statute are undefined, they have their ordinary meaning. The statute requires exhaustion of **available** administrative remedies, not "any institutional administrative remedy." Any other interpretation would compel the conclusion that "Congress intended to erect meaningless barriers to suit." Moreover, this interpretation of §1997e(a) is consistent with the reasoning of the majority of courts that have addressed this issue, *Garrett v. Hawk*, 127 F.3d at 1267; *Russo v. Palmer*, 990 F.Supp. 1047, 1050 (N.D. Ill. 1998); *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998); *Lunsford v. Jumao-As*, 139 F.3d 1233 (9th Cir. 1998).

Petitioner notes in *Garrett v. Hawk*, 127 F.3d at 1267, that the Tenth Circuit and the Supreme Court in *McCarthy v. Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992), that there is nothing to prevent Congress, and perhaps the Bureau of Prisons from enacting regulations

that would permit the recovery of monetary relief from prison officials. Petitioner argues that with the absence of such remedies the district court nor the appellate court cannot interpret §1997e in a manner that requires exhaustion of **unavailable** remedies.

Petitioner Muschette asserts that had he submitted a formal review of issues which relate to his complaint under 28 C.F.R. §542.10 seeking monetary relief for violation of his constitutional rights pursuant to Bivens and Title 42 U.S.C. §1983, the institution staff would reject the claim as constituting improper subject matter for administrative review. *Bureau of Prisons Program Statement 1330.13, ¶ 6(b)(2)* (refusing to consider claims for monetary relief).

Petitioner Muschette argues that Congress to date has not seen fit to enact administrative remedies that would, or even could, provide monetary relief that need to be exhausted before *Bivens or 42 U.S.C. §1983* could be brought against prison officials. While Congress could easily amend this oversight, until an administrative remedy is provided for monetary damages it must concluded that no exhaustion of administrative remedies exist to be exhausted.

Petitioner Muschette argues that he was not afforded due process by the holding of the lower courts when refused a leave to amend his complaint under *Federal Rules of Civil Procedure Rule 15.* Petitioner argues that the ORDER of March 23, 1999, there is no mentioning of the court GRANTING a leave to amend complaint. Petitioner argues that the lower court could have easily wrote on the ORDER that they were GRANTING leave to amend

complaint, but refused to do so. See *ORDER March 23, 1999, Appendix A (A.3).*

CONCLUSION

The district and the appellate court dismissal of Petitioner Muschette, *Bivens and 42 U.S.C. §1983,* against prison officials in their individual and official capacities for non-exhaustion of B.O.P. administrative remedies is inconsistent with the majority of the lower courts and the intention of Congress when formulating the new *Prison Litigation Reform Act (PLRA) 42 U.S.C. §1997e (Supp. 1998), Suits by Prisoners.*

The district and the appellate court denial of Petitioner Muschette leave to amend complaint is inconsistent with *Federal Rules of Civil Procedure Rule 15* and should have given him the opportunity to amend the complaint after thorough review of *March 23, 1999 ORDER.*

Petitioner Muschette prays for the foregoing reasons certiorari be granted in this case.

March 30, 2001

Respectfully Submitted,
DONOVAN A. MUSCHETTE
R/N # 44693-109
P.O. Box 5000
Yazoo City, MS 39194-5000

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-14883
Non-Argument Calendar

D.C. Docket No. 97-01499-CV-H-E

DONOVAN A. MUSCHETTE,

Plaintiff-Appellant,

versus

J.L. SIVLEY, Warden, FCI Talladega, R.S. MEEKS, Associate Warden, FCI Talladega, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

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(February 23, 2001)

Before TJOFLAT, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The district court dismissed appellant's *Bivens* claim on the ground that he failed to exhaust his administrative remedies under 42 U.S.C. § 1997e. He appeals, contending that (1) he was unable to exhaust his administrative remedies because appellees had placed him in administrative confinement, (2) the remedies that are available

are inadequate, and (3) the court erred in not granting him leave to amend his complaint.

Contrary to appellant's third point, our reading of the record indicates that, on March 23, 1999, the court gave appellant leave to amend his complaint. The amendment, however, did not solve appellant's problem; he has not exhausted his administrative remedies.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

DONOVAN A. MUSCHETTE, Plaintiff,	)	
vs.	)	
ASSISTANT WARDEN MEEKS, Defendant.	)	CV 97-H-1499-E

MEMORANDUM OF OPINION

(Filed Aug. 17, 2000)

The magistrate judge filed a report and recommendation on July 25, 2000, recommending that the sole claim remaining in this action – the denial of equal protection claim against Associate Warden Meeks – be dismissed without prejudice due to plaintiff's failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). The plaintiff filed objections to the report and recommendation on August 10, 2000.

Having carefully reviewed and considered *de novo* all the materials in the court file, including the report and recommendation and the objections thereto, the Court is of the opinion that the magistrate judge's report is due to be and is hereby ADOPTED and the recommendation is ACCEPTED. Accordingly, the complaint is due to be dismissed without prejudice due to plaintiff's failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a). A Final Judgment will be entered.

DATED this 17th day of August, 2000.

/s/ James H. Hancock
JAMES H. HANCOCK
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

DONOVAN A. MUSCHETTE, Plaintiff,	)	
vs.	)	
ASSISTANT WARDEN MEEKS, Defendant.	)	CV 97-H-1499-E

FINAL JUDGMENT

(Filed Aug. 17, 2000)

In accordance with the Memorandum of Opinion entered contemporaneously herewith and with Rule 58, FED. R. CIV. P., it is hereby ORDERED, ADJUDGED, and DECREED that plaintiff's sole remaining claim in this action is DISMISSED WITHOUT PREJUDICE due to plaintiff's failure to exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a).

Costs are taxed to the plaintiff.

For information regarding the cost of appeal, see the attached notice.

DATED this 17th day of August, 2000.

/s/ James H. Hancock
JAMES H. HANCOCK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

DONOVAN A. MUSCHETTE, Plaintiff,	)	
vs.	)	
ASSISTANT WARDEN MEEKS, Defendant.	)	CV 97-H-1499-E

ORDER

(Filed Mar. 23, 1999)

In an order entered February 26, 1999, the Court dismissed all of plaintiff's claims in this action except the equal protection claim against Associate Warden Meeks (Claim 1) and the conditions-of-confinement claims against defendants Hudson, Duncan, Pocock, Campbell, and Harvard (Claims 10, 11, and 12). By this same order, Claim 1 was referred to the magistrate judge for further proceedings in this court and Claims 10, 11, and 12 were severed from this action and transferred to the United States District Court for the Northern District of Georgia for further proceedings in that court.

Plaintiff has filed a "Motion for Reconsideration of Judgment and Amendment of Complaint" (Document #17) and a "Notice of Objections to Senior Judge's Order of Dismissal, Severed [sic] and Transferred [sic] of Claims" (Document #18). After thorough consideration of all the materials in the court file, the Court finds that

plaintiff's motion for reconsideration is due to be and it is hereby DENIED. Plaintiff's objections are OVERRULED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

DONOVAN A. MUSCHETTE, Plaintiff,	)	CV 97-H-1499-E
v.	)	
J. L. SIVLEY, et al., Defendants.	)	

MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION

(Filed Dec. 9, 1998)

Donovan A. Muschette, hereinafter referred to as plaintiff, has filed a *pro se* complaint pursuant to 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983 alleging that rights, privileges, or immunities afforded him under the Constitution or laws of the United States have been abridged during his incarceration in the Federal Correctional Institution at Talladega, Alabama ("FCI Talladega"), the United States Penitentiary in Atlanta, Georgia ("USP – Atlanta"), and the Atlanta City Detention Center. Plaintiff was incarcerated at FCI Talladega at the time the complaint was filed, but he has since been transferred to the Federal Correctional Institution at Yazoo City, Mississippi. Plaintiff names as defendants (1) J.L. Sivley, Warden, FCI-Talledega; (2) R.S. Meeks, Associate Warden, FCI-Talladega; (3) Bill Elston, Unit Manager, FCI-Talledega; (4) Ron Moses, Counselor, FCI-Talladega; (5) T.

Gellner, Case Manager, FCI-Talladega; (6) Michael Wright, Chaplain, FCI-Talledega; (7) Willie Scott, Warden, USP-Atlanta; (8) Kathleen M. Hawk, Director, Federal Bureau of Prisons; (9) R. Matthews, Regional Director, Federal Bureau of Prisons; (10) Henry E. Hudson, Director, United States Marshal's Service; (11) Lyn H. Duncan, United States Marshal, Atlanta, Georgia; (12) Tom Pocock, Director Atlanta City Detention Center; (13) William Campbell, Mayor, Atlanta, Georgia; and (14) Beverly Harvard, Chief, City of Atlanta, Georgia.[1] Plaintiff seeks monetary damages and various forms of equitable relief. He also seeks to have his "current prison sentence, supervised release, and all fines" vacated. In accordance with the usual practices of this court and 28 U.S.C. § 636(b)(2), the complaint was referred to the undersigned magistrate judge for a preliminary report an recommendation. *See McCarthy v. Bronson*, 500 U.S. 136 (1991).

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1 "*Bivens* establishes a cause of action against an individual *federal officer* if the federal officer violated the plaintiff's constitutional rights and such violation is a proximate cause of damages." *Dean v. Gladney*, 621 F.2d 1331, 1335 (5th Cir. 1980) (emphasis added), *cert. denied*, 450 U.S. 983 (1981). Plaintiff asserts that the Atlanta City Detention Center "is a Federal inmate holding facility owned and operated by the City of Atlanta." It therefore does not appear that defendants Pocock, Campbell, or Harvard are federal officers. If these three defendants are, in fact, state officers, the claims against them would more appropriately be brought under 42 U.S.C. § 1983. Regardless of how the claims against these defendants are construed, it is noted that, as a practical matter, "courts generally apply § 1983 law to *Bivens* cases." *Abella v. Rubino*, 63 F.3d 1063, 1065 (11th Cir. 1995).

Under the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134 § 804, 110 Stat. 1321, and 28 U.S.C. § 1915A, this court is required to screen complaints filed by prisoners against officers or employees of governmental entities and to dismiss the complaint or any portion of the complaint that it finds frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief. While the former 28 U.S.C. § 1915(d) permitted the court to dismiss claims *sua sponte* only if the court found them frivolous or malicious, the new § 1915A directs the court, in effect, to make and rule on its own motion to dismiss the complaint prior to service. In order to protect a *pro se* prisoner's right of access to the courts, however, these complaints are read by less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Harmon v. Berry*, 728 F.2d 1407, 1409 (11th Cir. 1984); *Watson v. Ault*, 525 F.2d 886, 891 (5th Cir. 1976).

Claims

Plaintiff has submitted a complaint that is 53 typewritten pages in length. The 36 claims for constitutional torts[2] set forth in this complaint are as follows:

(1) Defendant Associate Warden R.L. Meeks, F.C.I. Talledega, failure to allow Plaintiff

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[2] Neither § 1983 nor *Bivens* authorizes a federal cause of action based merely on state or common-law torts. The rights redressable under these federal remedies must be of a federal constitutional nature.

Donovan A. Muschette, the right to conduct a cultural upliftment class, shows reasonably [sic] bias and prejudice, because other inmates were conducting cultural based, non-mandatory classes with all necessary materials provided by the institution.

(2) Defendant Chaplain Wright, F.C.I. Talledega, deliberately showed religious discrimination by not conveying information to members of Rastafarian Religious Community pertaining to outside prison minister.

(3) Defendant Chaplain Wright, F.C.I. Talledega, deliberately suppress[ed] religious literature and materials by personally choosing and determining vendors and sources that he deem[ed] necessary for Rastafarian Religious Community.

(4) Defendant J.L. Sivley, F.C.I. Talladega, deliberately violate[d] Donovan A. Muschette['s] right to proselytize, and celebrate religious holiday free of disruption and repercussions by staff and administration.

(5) Defendant J.L. Sivley, F.C.I. Talladega staff and administration deliberately introduced chemicals and vapors into atmosphere surrounding Plaintiff Donovan A. Muschette, as a means of corporal punishment to induce mental and physical injury and possible human death.

(6) Defendant J.L. Sivley, F.C.I. Talladega staff and administration deliberately introduce[d] sedative drugs in meals and commissary food items in an effort to induce

sleep to Plaintiff Donovan A. Muschette, causing mental and physical injury and possible human death.

(7) Defendant J.L. Sivley, F.C.I. Talladega staff and administration deliberately withheld non-subversive African American magazines (EMERGE) from Plaintiff Donovan A. Muschette.

(8) Defendant J.L. Sivley, F.C.I. Talladega staff and administration deliberately delayed and withheld mail correspondence of family, friends, and co-defendant Dayanda Simpson from Plaintiff Donovan A. Muschette.

(9) Defendants of F.C.I. Talladega, U.S. Marshal Service, and U.S.P. Atlanta staff and administration deliberately punished Plaintiff Donovan A. Muschette by holding plaintiff in confinement at U.S.P. Atlanta for an extended period of time because of [his] political and religious views.

(10) Defendants of U.S. Marshal Service and Atlanta City Detention Center staff and administration deliberately introduce[d] Plaintiff Donovan A. Muschette to deplorable conditions and deprivation of proper maintenance of facility in which was wholly unfit for human habitation at ACDC.

(11) Defendants of U.S. Marshal Service and Atlanta City Detention Center and administration failed to provide a religious diet nutritionally adequate to meet the minimum caloric requirement and prison

dietary law for Plaintiff Donovan A. Muschette at ACDC.

(12) Defendants of U.S. Marshal Service and Atlanta City Detention Center and administration failed to provide Plaintiff Donovan A. Muschette with a smoke free envi[ron]ment at ACDC.

(13) Defendants of U.S. Marshal Service, U.S.P. Atlanta, Atlanta City Detention Center, and F.C.I. Talladega staff and administration abused the use of the confidential informant program to frustrate [sic] a criminal act against and to the Plaintiff Donovan A. Muschette.

(14) Defendants of U.S. Marshal Service, F.C.I. Talladega, U.S.P. Atlanta, and Atlanta City Detention Center in a concerted effort conspired to deny Plaintiff Donovan A. Muschette the right to prepare, serve, file, and receive legal materials in a timely manner to affect his appeal, by placing him in administrative detention and transition.

(15) Defendants of Atlanta City Detention Center, F.C.I. Talladega staff and administration in a concerted effort read, re-wrote, and withheld inmate correspondence between Plaintiff Donovan A. Muschette and co-defendant Dayanda Simpson, FPC Bryan.

(16) Defendants of Atlanta City Detention Center deliberately introduced psychologist to Plaintiff Donovan A. Muschette in an effort to pronounce him mentally unstable, so in the event of a planned murder/

suicide defendants are free of responsibility.

(17) Defendants of F.C.I. Talladega deliberately introduced psychologist to Plaintiff Donovan A. Muschette in an effort to pronounce him mentally unstable, so in the event of a planed murder/suicide defendants are free of responsibility.

(18) Defendants of F.C.I. Talladega, U.S.P. Atlanta, U.S. Marshal Service, and Atlanta City Detention Center staff and administration in a concerted effort conspired to cause human death of Plaintiff Donovan A. Muschette.

(19) Defendants at U.S.P. Atlanta staff and administration deliberately introduced chemicals and vapors into the atmosphere surrounding Plaintiff Donovan A. Muschette, as a means of corporal punishment to induce mental and physical injury and possible human death.

(20) Defendants at U.S.P. Atlanta staff and administration deliberately introduce[d] sedative drugs in meals of Plaintiff Donovan A. Muschette in an effort to induce sleep, physical and mental injury, and possible human death.

(21) Defendants J.L. Sivley, F.C.I. Talladega staff and administration deliberately attempt[ed] to transfer Plaintiff Donovan A. Muschette because of [his] religious and political ideology.

(22) Defendants J.L. Sivley, F.C.I. Talladega staff and administration deliberately showed bias and favoritism by allowing

other inmate[s] inmate to inmate phone privileges, while denying Plaintiff Donovan A. Muschette.

(23) Defendants J.L. Sivley, F.C.I. Talladega, and Federal Bureau of Prisons Atlanta, staff and administration deliberately in a concerted effort placed an unwarranted management Variable on Plaintiff Donovan A. Muschette, thereby increasing his security level.

(24) Defendants J.L. Sivley, F.C.I. Talladega, and Federal Bureau of Prisons Atlanta, staff and administration deliberately in a concerted effort placed Plaintiff Donovan A. Muschette on (ISM) Inmate System Monitoring and withheld personal security and safety information from Plaintiff.

(25) Defendants J.L. Sivley, F.C.I. Talladega staff and administration deliberately intimidated law clerk/jailhouse lawyer, into not providing legal assistance to Plaintiff Donovan A. Muschette to affect present civil suit.

(26) Defendants J.L. Sivley, F.C.I. Talladega staff and administration deliberately removed Plaintiff Donovan A. Muschette['s] family and friend from computer visiting list, thereby denying visiting privileges.

(27) Defendants J.L. Sivley, F.C.I. Talladega staff and administration deliberately harassed and delayed Plaintiff Donovan A. Muschette's family and friends during the course of their visit.

(28) [Defendants] J.L. Sivley, F.C.I. Talladega staff and administration deliberately placed Plaintiff Donovan A. Muschette in administrative detention in an effort to limit his access to petition the courts of aforesaid abuses, in present civil suit.

(29) [Defendants] J.L. Sivley, F.C.I. Talladega staff and administration deliberately removed articles of clothing and legal documents from Plaintiff Donovan A. Muschette, while in Administrative Detention.

(30) [Defendants] J.L. Sivley, F.C.I. Talladega staff and administration deliberately called Federal Aviation Administration in an attempt to have Plaintiff Donovan A. Muschette's Airframe and Powerplant Certificate revoked.

(31) [Defendants] J.L. Sivley, F.C.I. Talladega staff and administration deliberately introduced a verbal contract with prison staff, administration, and inmates for the demise of Plaintiff Donovan A. Muschette.

(32) Defendants at F.C.I. Talladega, U.S.P. Atlanta, U.S. Marshal Service, and Atlanta City Detention Center staff and administration has [sic] caused present and future paranoia to Plaintiff Donovan A. Muschette of all prison staff, administration, and inmates.

(33) Defendants J.L. Sivley, F.C.I. Talladega staff and administration [are] xenophobic towards Plaintiff Donovan A. Muschette for his religious and political ideologies.

(34) Defendants at F.C.I. Talladega, U.S.P. Atlanta, Bureau of Prisons Atlanta, U.S.

Marshal Service and Atlanta City Detention Center staff and administration in a concerted effort caused physical and/or mental injury to Plaintiff Donovan A. Muschette requiring medical attention outside of the aforesaid agencies.

(35) Defendants at F.C.I. Talladega, U.S.P. Atlanta, U.S. Marshal Service and Atlanta City Detention Center staff and administration in a concerted effort introduced confidential informants to and for the purpose of aiding in physical injury and/or human death of Plaintiff Donovan A. Muschette.

(36) Defendants at Federal Bureau of Prisons, Atlanta, deliberately disregarded Plaintiff Donovan A. Muschette['s] plea for Administrative Remedy Form BP-10.

Complaint at 42-47.

Plaintiff's Allegations

Plaintiff states that he is a naturalized United States citizen currently serving a 100-month sentence. Plaintiff was transferred to FCI Talladega from Maxwell Air Force Base, where he had taught an inmate education course in African History. In June 1996, plaintiff asked the Educational Supervisor at FCI-Talladega, Mr. Grace about the possibility of his teaching the African History course at FCI-Talladega. Mr. Grace referred plaintiff to the Assistant Education Supervisor, Mr. Preston, who instructed plaintiff to prepare a syllabus. Plaintiff prepared the syllabus and gave it to Mr. Preston. After plaintiff made several inquiries with regard to the status of his request,

Mr. Preston told him that final approval would have to be obtained from Associate Warden Meeks.

Several weeks later, plaintiff was told that Associate Warden Meeks "denied the class because no cultural classes were being taught at F.C.I. Talladega." Plaintiff spoke with Assistant Warden Meeks and was told that "inmates don't instruct classes at F.C.I. Talladega." Plaintiff states that he "investigated" and learned that inmate Robert Jonas was teaching an accounting class and that inmate Marcus Camargo was teaching "spanish/cultural." Plaintiff sent an "Inmate Request to Staff Member" to Associate Warden Meeks setting forth this information and, in essence, asking for a reconsideration of the decision regarding his African History class. Exhibit D to complaint. Associate Warden Meeks responded in a memorandum in which he stated: "The African History class is not a mand[a]tory class to be offered. Also, additional financial funds are not available for a non-mand[a]tory class." Exhibit E to complaint. Plaintiff states that he had never requested any funds "because course can be taught on handouts," and that books were provided by the institution for the accounting and Spanish classes.

Plaintiff is a Rastafarian and, starting in July 1996, conducted weekly Rastafarian services at FCI-Talladega. The Rastafarian Religious Community arranged, with the approval of the prison administration, to have a guest speaker on July 27, 1996. On the day the speaker was to appear, "[m]embers of the community and inmate population waited patiently up until the very hour of [the speaker's] appearance," but the speaker was a "no show." The "officer in the chapel" then told the inmates that the

speaker "had canceled days ago." Chaplain Wright, however, had not conveyed this information to the Rastafarian inmates.

Plaintiff and members of the Rastafarian Religious Community submitted a request to borrow some video tapes from Maxwell Air Force Base. Chaplain Wright stated that the inmates at Maxwell "were using the videos to teach a class, but [the FCI-Talladega inmates] could borrow a couple and return them." However, the tapes never arrived. The FCI-Talladega Rastafarian inmates also submitted numerous requests to purchase tapes with funds allotted to the Rastafarian Religious Community, but these requests have been "constantly denied or put off." Chaplain Wright has suggested that the inmates "order from a source that he personally chose."

When plaintiff first began conducting Rastafarian services in July 1996, no staff members attended the services. "As members began to proselytize, participation increased, nearly doubling." Two correctional officers, Unit Manager Merrand and Lieutenant Fontane, then began attending the services and questioning members "about doctrines." "Quite sometime afterward" plaintiff asked Lieutenant Fontane why the officers were attending the religious services. He was told "the Administration warranted [sic] her presence."

During the month of October 1996, plaintiff and representatives of four other religious groups sought permission to celebrate the so-called Holy Day of Atonement on October 16, 1996. Although the BOP and FCI-Talladega did not recognize it as an official holiday, Warden Sivley

and Captain Fulcher granted the request in part, "allowing the preparations for the fast and a portion of time for each individual [religious group] to observe in the chapel." On the evening of October 15, 1996, Delta Unit Manager Elston "announced the provisions of the Holy Day" and requested that inmates sign up if they were going to participate in the morning and evening fast. According to plaintiff, Elston also stated that if an inmate was not going to participate in the morning fast, he did not have to sign up. However, on the "evening of The Holy Day, several inmates were escorted to Administrative Detention because their names did not appear on the sign up sheet." "Several members from the respective [religious] communities" were investigated and/or transferred following this incident. There is no indication that plaintiff himself was investigated or detained.

On October 29, 1996, plaintiff was placed in administrative detention. Plaintiff states that this occurred "shortly after" he questioned Lieutenant Fontane about her attendance at the Rastafarian services. An Administrative Detention Order submitted by plaintiff as Exhibit I is dated "1-29-96/3:00PM" and states that plaintiff was "being placed in Administrative Detention pending the completion of an SIS investigation." Plaintiff states that he remained in administrative detention for 18 days, during which he asked several officers, including Warden Sivley, why he had been confined, but no one gave him a reason.

While in administrative detention, plaintiff "continually experienced" migraine headaches and excessive drowsiness. He spoke with two other administrative

detention inmates who stated that they had also experienced these things. Plaintiff states that he did not receive his monthly issue of *Emerge* magazine while he was in administrative detention or for the next five months. He also states that while in administrative detention his mail "from family, friends, and co-defendant, Dayanda Simpson," were "continuously received unusually late"; specifically, he "received his mail sometimes two weeks or more after the postmarked date."

On November 18, 1996, Case Manager Gellner informed plaintiff that "he was returning to court on a writ and was being transferred to another facility." When Gellner asked plaintiff if there was an institution where he would like to go, plaintiff replied, "Fort Dix F.C.I." Although Gellner gave plaintiff an inmate request form to fill out, he has not been transferred to Fort Dix.

Plaintiff states that, on November [2]1, 1996, he was transferred from FCI-Talladega to USP-Atlanta for a court appearance.[3] Plaintiff made his court appearance on either November 13 or November 21, 1996. He was then returned to USP-Atlanta where he remained until December 30, 1996. On December 30, 1996, plaintiff was transferred to the Atlanta City Detention Center. According to plaintiff, the Atlanta City Detention Center "is a Federal inmate holding facility owned and operated by the City of Atlanta." Plaintiff states that inmates are given "one pants [sic], a tee-shirt, set of bed linen, and hygiene

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[3] The Court notes that plaintiff states that he was placed in administrative detention at FCI Talladega on October 29, 1996, and that he remained in administrative detention for twenty days until November *18*, 1996.

items" upon arrival at the Atlanta City Detention Center. According to plaintiff, "[t]hese clothing items were not changed for two weeks at a time." Plaintiff states that he requested "a change of clothing and linen verbally, and sent numerous request[s] to staff, only to be ignored." Plaintiff also "complained verbally and in writing about the condition of the POD, i.e., atrociousness of the shower and the leaking of the plumbing in the recreation area which was a safety hazard."

Plaintiff states that he requested a "no meat" tray due to his Rastafarian beliefs. The "no meat" tray provided "mostly consist[ed] of salad and bread [and] did not meet the minimum caloric requirement by prison dietary laws." Plaintiff states that he also complained about the "condition of the trays which had cigarette burns" and that he requested that 3NE/POD be divided into smoking and non-smoking areas.

While in Atlanta city Detention Center, plaintiff made the acquaintance of one Richard Boone, another federal inmate, and apparently had several conversations with Boone in which religion and politics were discussed. On March 22, 1997, plaintiff read a newspaper article that indicated that inmate Boone had provided substantial assistance in the conviction of another inmate for the murder of a USP-Atlanta officer. Plaintiff then "sever[ed] all ties" with Boone. He felt "Boone and the majority of the inmates were working in the capacity of U.S. confidential informants and took a vow of silence while in 3NE/POD."

On Thursday, March 27, 1997, the inmates in 3NE/POD were locked down at 11:00 p.m. Around midnight,

however, plaintiff observed inmate Montgomery "sneaking towards shower." When Montgomery returned from the shower, he "head[ed] towards the vicinity of inmate Richard Boones' cell #14 and [plaintiff's] cell #13." Plaintiff states that when Montgomery noticed that plaintiff was watching him, he disappeared from sight. At 5:00 a.m. on March 28, 1997, the midnight officer opened plaintiff's cell door. Cell doors were normally opened around 7:00 a.m., unless an inmate had signed the razor sheet the night before. Plaintiff informed the midnight officer that he did not want his door opened and asked to speak to "someone in higher authority because he did not feel secure." The midnight officer left the area to summon the lieutenant. While the midnight officer was gone, Richard Boone woke up inmates Chino and Montgomery and "dialogued for several minutes." The lieutenant came to the POD, but he was met at the door by inmate Chino, who held a "dialogue" with him for several minutes, and plaintiff did not get to speak with him. The midnight officer returned around 7:00 a.m., at which time plaintiff stated that he had not been able to talk to the lieutenant and that "if he could not see [the lieutenant], then take him directly to lock-up." The midnight officer suggested that plaintiff move to another POD.

Plaintiff then moved to 3SE/POD on the same floor of the detention center. On Friday night March 29, 1997, after the officer "called lock-down for inmates to return to their cells," plaintiff observed "two inmates who favored Boone and Montgomery being brought in by the officer." Plaintiff stayed awake, just lying on his bunk for several hours. At some point during the night, the lights then went off, although there was no rain or lightening

outside. There was no emergency back-up lighting. Plaintiff got dressed and sat on a milk crate by his cell door. "Shortly afterwards, [he] saw two flashlights in the hall area outside of the POD, shining towards him." The lights were off "a couple of hours." At day break, the midnight officer delivered medication to the inmates in their cells, although normally inmates "go to the cart in the corridor." Breakfast, which was normally served at 7:00 a.m., was not served until 9:30 a.m. Plaintiff felt "that his life m[ight] be in jeopardy . . . because of his political and religious astuteness or about the role Richard Boone fabricated in the murder trial," and he asked to be placed in detention.

Plaintiff was then placed in the detention unit in a cell next to an inmate identified only as "Red." According to plaintiff, "officers and staff checked on [him and Red] constantly throughout the day and even more frequent at night, claiming they were signing off on the sheet next to the cell." Several times while plaintiff was using the telephone, officers left the "main detention door open." Plaintiff thereafter had Red make telephone calls for him. Plaintiff or Red called "a number of family members and friends" to explain "the life threatening situation [plaintiff] was going through." Plaintiff states that he "wrote the B.O.P. Regional Office twice pertaining to the reason for being held in a city jail and the limited access to legal material and personal property to proceed with his appellate process."[4] He also "inquired about

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[4] Plaintiff has submitted, as Exhibit J, a letter from Rise Weathersby, a staff attorney with the Federal Defender Program in Atlanta, Georgia, in which attorney Weathersby states that he has "been assigned to handle [plaintiff's] appeal."

Administrative Remedy Form BP-10," but "his request was disregarded."

On March 30, 1997, "the psychologist came to visit asking a host of unimportant questions as though [plaintiff] were suffering from a psychological disorder. When [plaintiff] began to explain the events of the past few days, the psychologist just totally disregarded the information and had the officer return him to detention." On March 31, 1997, plaintiff noticed "an abundance of high ranking [Atlanta City Detention Center] official[s] dialoguing for quite some time." Although the officials "constantly point[ed] in the direction of [the] detention area where [plaintiff was] confined, none of the officials c[a]me to speak with him." On April 1, 1997, plaintiff noticed "an abundance of [Atlanta City Detention Center] officials entering and leaving area of 3NE/POD." Plaintiff "explain[ed the] events of [the] past several days" to Ms. Thomas of inmate services, and later to a captain and an officer.

On April 2, 1997, plaintiff and Red were transported to USP-Atlanta. Upon their arrival, a counselor took five sets of photographs of plaintiff and four sets of pictures of Red. According to plaintiff, only one set of pictures is required on intake. The counselor explained that she "kept messing up taking pictures upside down." Plaintiff was then sent to DCU 11, where he was placed in a cell with two other inmates. One of the inmates was moved to another cell the next day. On April 3, 1997, plaintiff noticed "a razor fall on the floor" near the other inmate. Plaintiff "confronted the inmate about the razor and his intended use of it, [but] he remained quiet about the issue." Plaintiff summoned an officer and "explained that they were unable to get along and that one of them

need[ed] a room change." This officer was unsympathetic, so plaintiff "explained the situation" to another officer. Plaintiff was then placed in administrative detention.

When placed in administrative detention, plaintiff immediately smelled the odor of fresh paint, but his cell had not been recently painted. He continued to smell the odor which "put him in a hard comatose sleep and [caused him to have] a migraine headache." Plaintiff requested a change of clothes, linens, and mattress because of the fumes. After a verbal confrontation with one officer, a lieutenant "granted [plaintiff] a new mattress and promised the remaining things which never materialized." Plaintiff states that, throughout the time he was in detention, he "continuously smelled and heard the spraying of fumes from the room next door to him." He stuffed toilet paper in his cell's air vent in an attempt to alleviate the smell, but was unsuccessful. He then noticed an opening in the electrical wall socket and a hole in the wall. When he stuffed these openings with wet toilet paper, "the smell somewhat subsided." The next day, plaintiff saw "an officer putting the fumigated mattress in the air conditioning room for his particular cell. The fumes that had subsided were more prevalent than ever." Plaintiff then put "a wet towel over his nose and mouth to avoid the fumes."

Plaintiff states that he noticed that the night shift officers "began leaving the main door of the detention [area] open during the night shift" and that officers would come by his room "approximately every 15 minutes to half hour, throughout the night." Plaintiff states that he "stayed awake most nights because of the intoxicating fumes and paranoia." Plaintiff "refused to eat food cooked by the staff" while in detention, because he

"automatically became sedated and fell into a comatose sleep" when he ate such food. Instead, he ate pre-packaged cereal.

Plaintiff was transferred back to FCI-Talladega on April 7, 1997. Upon his arrival, he asked Warden Sivley if he was still under investigation and Warden Sivley replied, "Oh, that's over with, you'll be just fine." Plaintiff was placed in administrative detention "pending bed space." Plaintiff states the he "hardly ate the food given to him by staff, because he started experiencing the sedated feeling that he had previously experienced at U.S.P. Atlanta."

Plaintiff shared his cell with inmate Clovis Marietta. Marietta told plaintiff that "he had finally gotten correspondence with his girlfriend at FPC-Bryan and was able to make phone calls to her on a regular basis through the counselor in his unit." Plaintiff told Marietta that "he was appealing his sentence and the counselors in Delta unit refused to give him a phone call to his girlfriend/co-defendant, who also resides at FPC-Bryan, Texas."

Plaintiff states that other prisoners who returned to FCI Talladega at the same time that he did were sent directly back to their units or to Alpha C unit, "a temporary holding unit for inmates in population." Plaintiff began to notice that "officers were constantly checking the room during the day and night" and this caused him "to become paranoid because of his previous experiences."

On April 9, 1997, plaintiff was returned to Delta B unit and was placed in a cell with inmate Hodges. Plaintiff states that he "notice[d] the same pattern of officers constantly checking the room. Plaintiff hardly slept and

every time the officer came by to shine the light, he awoke."

A few days after his return to Delta B unit, plaintiff went with Case Manager Gellner to a "pre-team"[5] where he "was told that he had been a security risk and that he was on ISM, Inmate Monitoring System, because there was an inmate in the system that he had to be separated from." Plaintiff states that before leaving FCI-Talladega, "he had no separatees and only one co-defendant." Plaintiff asked "how he had gotten a separatee," and Gellner told him that the matter was confidential.

On April 15, 1997, plaintiff told Case Manager Gellner "about the strange activity of officer[s] on the midnight shift and the constant checking." He also "explain[ed] about [his] experience with inmate Richard Boone at Atlanta City Detention Center, and t[old] Gellner that he d[id] not want to be a part of that." Case Manager Gellner suggested that they talk with Unit Manager Elston about the matter. When plaintiff "reiterate[d the] story to Elston," Elston asked him if he did not feel safe in his unit. Although plaintiff made no reply, Elston called the Administrative Detention Building and gave instructions for the compound officer to pick up plaintiff "and put him somewhere where [he would] be safe." Plaintiff was placed in detention on April 15, 1997. He states that Case Manager Gellner came to visit him and "explain[ed] that Elston had to lock him up because of what he said." According to plaintiff, Gellner also stated

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[5] According to plaintiff, "[t]eam and pre-team, you meet with the staff of your unit and discuss institution adjustment."

that Elston "would be bringing something for [plaintiff] to sign in the next couple of days," but this "never materialized."

While in detention, plaintiff "began to smell the fumes of Lisa Institutional Floating Soap," which, he says, caused him to have "increasing short[ness] of breath and severe migraine headaches." Plaintiff began to "clog vents to no avail, so he use[d] a wet towel to gather a semblance of air [sic]." According to plaintiff, the fluorescent lighting increased the pain of his migraine headaches, "so after the sun set [plaintiff] remain[ed] in the dark for the remainder of time."

Plaintiff states that on his first day in detention, he ate the lunch and dinner meal, then "f[ell] into a comatose sleep." "[F]rom that point on, [plaintiff] decided to go on a fast to increase his spiritual strength and avoid sedated meals, for fear that if he fell into a deep sleep something m[ight] happen to him." Plaintiff states that he "did not eat until he returned back to compound on April 22, 1997."

On Wednesday, April 16, 1997, plaintiff was taken to the shower in handcuffs. The lights in the shower were out and while plaintiff was showering "an orderly called N.Y. continue[d] to lurk around the shower." The officer who escorted plaintiff to the shower took "an extremely long time to return after [plaintiff finished] showering." While returning plaintiff to his cell, the officer "held [plaintiff] by handcuffs behind his back," but "the other inmate was free to walk alone." Plaintiff declined to take a shower for the remainder of the time that he was in detention.

On Friday, April 18, 1997, plaintiff was told to pack his things for a move to another cell. Plaintiff protested and asked the officer why he was in detention. The officer told him that he had to move and that he would be released soon. Plaintiff was then placed in a cell with inmate Darryl Cobb. Although plaintiff was assigned the top bunk, he slept on the floor of the cell most of the time, "because [he] was le[e]ry about this change of cell." While in the cell with Cobb, plaintiff "notice[d] the aroma of Lisa Floating Soap and clog[ged] the vents, [which provided] minor relief." Plaintiff then "slept on the floor near the window where he was able to catch a draft of fresh air." When plaintiff asked Cobb if he smelled the fumes, Cobb ignored him.

Plaintiff states that he often heard orderlies with the nicknames of N.Y. and Red talking to an inmate with the nickname of Johnny Cochran. During their conversations with Cochran, plaintiff would hear N.Y. and Red "messing with the bolt locks on the door." When plaintiff would "appear at the door, [the orderlies] would leave or show signs of nervousness." On one occasion, plaintiff heard inmate Johnny Cochran say, "Man, they really want that dude bad." Plaintiff states that he "would hear a sound of a machine running all throughout the day and night in interval[s], coming from the next cell where inmate Johnny Cochran reside[d]."

On Monday, April 21, 1997, plaintiff and his cell mate, Darryl Cobb, were told that the unit team would be meeting with them shortly. Plaintiff states that prior to meeting with the unit team, Dr. Martin asked to meet with him. According to plaintiff, he was handcuffed and taken to the detention unit library where Dr. Marshall

and an assistant "asked a battery of unimportant questions." Plaintiff states that he told Dr. Marshall and the assistant that he was "disoriented and need[ed] fresh air." When they asked him why he did not go to recreation, plaintiff responded that he had been placed "in confinement for his personal safety by Unit Manager Elston and would not be going out to recreation until he f[ound] out the nature of his situation."

Later that day, plaintiff met with unit team members Case Manager Gellner and Unit Manager Elston in the detention unit library. Plaintiff states that he talked with Gellner and Elston "about transfer, custody level, and ISM (Inmate System Monitoring)." Plaintiff states that he also asked Elston why he had been placed in detention and when he would be released from detention. Plaintiff says that he "explained he need[ed] air because of room and he need[ed] to talk with his family, because inmates in detention use the phone once a week for 15 minutes on the weekend." According to plaintiff, Elston said that "he would see what he could do."

On Tuesday, April 22, 1997, plaintiff was "released back to compound temporary housing unit Alpha C" and was "given back all his personal property after six months." Plaintiff states that he inspected his property and found that all his sweat clothes and "some personal papers" were missing. Prior to leaving the detention unit, plaintiff questioned the lieutenant "about the reasoning for [his] confinement and the reason for [his] release, [but the] Lt. had no reasoning."

Plaintiff was placed in a cell in Alpha C unit and was assigned the top bunk. After an undisclosed period of

time, plaintiff's cell mate, inmate Young (also known as L.A.), moved out and inmate Jackson (also known as Jesus Christ) moved in. According to plaintiff, Jackson asked him "a battery of questions" until plaintiff "distance[d] himself and finally t[old] Jackson don't talk to him period." Thereafter Jackson "declared himself insane and said Kenny Rogers was God," and his father. The next day, Jackson moved into the cell next door.

Plaintiff states that his next cell mate was inmate Dennis. According to plaintiff, Dennis "shout[ed] out in the night while [plaintiff was] lying down. 'You're a dead man.' " Plaintiff states that he questioned Dennis "about working for law enforcement or a confidential informant," but Dennis denied that he was working as either. Dennis moved out of the cell shortly afterward.

Plaintiff states that he began to experience headaches and shortness of breath, so he clogged the vent, "to no avail." He says that he also began to hear a "machine next door coming from [Jackson's cell], also constant flushing of toilet."

After inmate Dennis moved out of plaintiff's cell, an inmate nicknamed "Disco" moved in. Plaintiff states that he "explain[ed] to Disco that [he was] going through a crisis and [was not] up for conversation." According to plaintiff, he stayed awake all night that night and "notice[d] the frequency of officers checking the room throughout the night." Disco moved out of the cell the next day.

An inmate nicknamed "Three Fingers" then moved in. Plaintiff states that the officer asked him to "give up the bottom bunk because Three Fingers ha[d] a medical

permit." Plaintiff agreed, but states that he slept on the floor rather than the top bunk. Plaintiff says that he woke before Three Fingers and Three Fingers "drop[ped] an object out of his hand while sleeping." Plaintiff picked up the object and found it to be a "U.S. Government Skilcraft ink pen." According to plaintiff, an inmate at Maxwell "nearly los[t] his life because another inmate cut him across the neck, barely missing his jugular vein, with the same identical pen." Plaintiff states that when Three Fingers awoke, he "beg[an] to look for [the] ink pen." Plaintiff gave the pen to Three Fingers asking, "This what you looking for?" Plaintiff states that Three Fingers moved shortly afterwards.

Plaintiff states that he "realized that his life [might] be in danger and his death could easily be construed as a suicide." He therefore "began to take more precautions to secure himself." He kept a locker in front of the door while in his cell, wore his "institutional-issued army jacket" when "going on the compound," and "hardly ever went to [the] dining hall because the dining hall is a known place for incidents to happen and go unresolved." Plaintiff states that "[s]everal times while [he] was watching television at the top of [the] stairs outside his cell, several inmates gathered as though they were ready for attack until [plaintiff] noticed [their] peculiar behavior and retired back to his room where he felt more secure."

Plaintiff states that, before his next cell mate arrived, he clogged the sink and the fumes in his room "somewhat subsided, but the machine continued day and night." According to plaintiff, on one occasion, an individual in the next cell said, "Dam[n], he found out about the sink."

Plaintiff's next cell mate was inmate R. Spears. Plaintiff asked Spears if he was "a law enforcement agent or a confidential informant," and Spears stated that he was not, but "explained that he just had a vicious assault on an inmate." Plaintiff told Spears that he "felt insecure around the inmates and staff at F.C.I. Talladega and that he was watching everyone." Plaintiff states that he also "explained about the clogging of the vent to secure breathing air." According to plaintiff, when he asked Spears if he smelled the fumes, Spears "agreed that he did and he also agreed to hearing the machine which [plaintiff] pointed out to him several times."

Because plaintiff was keeping a locker in front of the cell door as a safety precaution, he had to move the locker each time Spears came into the cell. Plaintiff states that on an unspecified date, Spears entered the cell with "a belt in hand and a grimace look [sic] on his face." Shortly after Spears entered the cell, plaintiff's ex-cell mate Three Fingers "fl[ung] the door open with government pen in hand, but [wa]s suddenly stopped by [the] locker." Plaintiff states that Three Fingers stared at him and Spears, then asked if they "had seen a pair of slippers he might have left behind." Plaintiff "reache[d] for something under his pillow and t[old] three Fingers that he had not left anything." Three Fingers then left the cell.

Plaintiff states that on an unspecified night, he was "awakened by the voice of the midnight officer." According to plaintiff, the officer told the inmate in the cell next door to "wake up and put your cloth[es] on, he's asleep." Plaintiff, "being a very light sleeper because of prior incidences, roll[ed] over and open[ed] his eyes. When the

officer shone his light back into plaintiff's cell, he said, "never mind, dam[n], he's aw[a]ke."

Spears moved after a week in the cell with plaintiff. Plaintiff's new cell mate was inmate Terry Russell. Plaintiff states that Russell's voice sounded like that of the inmate nicknamed Johnny Cochran who was housed in the cell next to plaintiff in administrative detention. When plaintiff asked Russell if Russell had been in the cell next to him in detention, Russell said "yes, no [sic] and they don't call him Johnny Cochran." Russell also "mention[ed] that the word from the officers is that you don't sleep." Plaintiff states that Russell moved out shortly afterwards and inmate R. Thrift became his new cell mate. According to plaintiff, Thrift was "an older fellow who continuously watche[d] [plaintiff] in a peculiar manner." Thrift moved out after a couple of days and inmate D. Bell moved in. Plaintiff states that Bell "seem[ed] alright, [but] ha[d] the tendency to leave [the] cell door open."

Plaintiff states that his experience in Alpha C Unit was "very extraordinary" in that he had a total of nine cell mates between April 22, 1997 and May 20, 1997. He also states that "most" of his cell mates were either [as] big as or bigger than [he], with a history of violence in their past." Plaintiff also states that during his stay in Alpha C Unit, he "would frequent the recreation yard, hanging out under a little shed adjacent to [the] recreation yard entrance gate, alone." When other inmates approached him to try to converse with him or to persuade him to return to the chapel or to eat in the dining hall, plaintiff "refused to answer their question[s] on many occasions because he felt someone may have sent

them to ask those specific questions as a ploy to have in those particular area[s] for a setup [sic]." Plaintiff told the other inmates that he was on "sabbatical" and "also mentioned that he did not deal with informants, so finally they stop[ped] coming around."

Plaintiff states that on a unspecified date inmate Gregory Matthews offered him a razor blade knife, which plaintiff refused. After plaintiff refused the razor blade, his cell "was searched thoroughly by the unit officer." Plaintiff states that inmate Matthews "was part of the Rastafarian Religious community prior to [plaintiff's] being sent to Administrative Detention [on] October 29, 1996," but that Matthews quit coming to services shortly after his Unit Manager Marrand started attending." According to plaintiff, once he returned to FCI-Talladega from Atlanta, "Matthews seem[ed] to try and set him up several times." Plaintiff states that before he left FCI Talladega for Atlanta, "Matthews made him aware that [Matthews] was a confidential informant and could not be trusted." Plaintiff states that he was also offered a knife by inmate Armstrong of Gamma B Unit. According to plaintiff, "[o]n several occasions [he] caught Armstrong trying to sneak up on him and when Armstrong figured out [plaintiff] knew what was going on, [Armstrong] act[ed] like he was coming in peace [sic]."

Plaintiff states that, on May 5, 1997, he attended an Admission and Orientation Class and was told to pack because he was returning to Delta B Unit. Before leaving, he "went next door and spoke with" inmate Jackson (Jesus Christ) and inmate Donaldson "concerning the constant smell of fumes coming from their room and the sound of the machine. Both Jackson and Donaldson

stared at [plaintiff] dumbfounded until [plaintiff] left." Plaintiff returned to Delta B Unit on May 5, 1997.

On May 23, 1997, plaintiff sent Unit Manager Elston an inmate-to-staff request form "requesting information about his experiences of the last eight months." He states that Elston was "not able to give [him] the reasoning for such action." That same date, plaintiff sent the "SIS department, [the] office responsible for prison investigations," inmate request forms in which he inquired why he had been placed in administrative detention on April 15, 1997, and October 29, 1996. He states that he has not received a response to these request forms. Also on May 23, 1997, plaintiff sent Case Manager Gellner an inmate request form inquiring why he had been placed on Inmate System Monitoring (ISM). The request form was returned to plaintiff on May 27, 1997, with the notation "see me regarding your request." When plaintiff saw Gellner the next day, he asked if Gellner wanted to see him and Gellner replied that he did not.

Plaintiff states that he "turned in visiting request forms [in] August 1996, to Counselor Moses." He asked Moses "if the two individuals were approved [to] visit" and Moses replied that they were. Plaintiff states that his "two friends" arrived at FCI-Talladega on August 10, 1996, but "they were denied entrance saying they were not in the computer." Plaintiff states that on May 4, 1997, "friends" came to FCI-Talladega and "were harassed for hours before [being] allowed to visit [him]." On May 27, 1997, plaintiff requested a copy of his visiting list from Counselor Moses. However, when Moses attempted to "pull [plaintiff] up on [the] computer, [he was] non-

existent." Plaintiff states that he currently "has no visiting list."

Plaintiff states that after he returned from Atlanta to FCI-Talladega he noticed "that most of the inmates he knew, including the members of the Rastafarian Religious Community, were acting strange towards him." He says that "[u]sually that type of behavior is only warranted when an individual goes back to court to testify on someone." According to plaintiff, inmate Donovan Jones, the "jailhouse lawyer refuse[d] to help him litigate this current issue, as though someone had given him and all the others strict orders to stay away from [plaintiff]."

Equal Protection – Cultural Class

Plaintiff complains that Associate Warden Meeks has denied him "the right to conduct a cultural upliftment class, show[ing] reasonably [sic] bias and prejudice" (Claim 1). He alleges that other inmates teach classes in Spanish and accounting using books provided by the institution and indicates that he has been denied the opportunity to teach the African History class because of the subject matter. It is clear that an inmate has no constitutional right to attend educational courses. *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985); *Garza v. Miller*, 688 F.2d 480, 485 (7th Cir. 1982), *cert. denied*, 459 U.S. 1150 (1983). It follows that an inmate has no constitutional right either under the First Amendment or the Due Process Clause to teach an educational or cultural class. Consequently, if plaintiff was claiming merely that he has been denied the right to teach "a cultural upliftment

course," the claim would be due to be dismissed for failing to state a claim upon which relief can be granted.

Plaintiff does not, however, merely claim that he has been denied the right to teach or conduct "a cultural upliftment class." It is clear that he is, instead, attempting to assert that he has been denied the right to teach "a cultural upliftment class" in violation of his right to equal protection under the laws. He alleges in particular that inmates Robert Jones and Marcus Camargo have been allowed to teach accounting and Spanish culture. Implicit in his claim is the assertion that the denial of his request to teach an African History class is racially discriminatory. Although the fact that inmate Jones teaches accounting indicates nothing about a racial motive for denying plaintiff's request, allowing an inmate to teach a Spanish culture class while denying plaintiff the opportunity to teach an African History class raises the possibility of discrimination based on race. This claim cannot be dismissed at this juncture, and a response from defendant Meeks will be required.[6]

Religion Claims

Plaintiff asserts that Chaplain Wright "deliberately showed religious discrimination by not conveying information to [the] members of [the] Rastafarian Religious Community pertaining to outside prison minister" (Claim

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[6] Although plaintiff names several other people in connection with this claim, it is apparent from his own complaint that Warden Meeks made the final decision whether to allow the course. It is, thus, his motivation that is the crux of the equal protection issue.

2) and that Chaplain Wright "deliberately suppress[ed] religious literature and materials by personally choosing and determining vendors and sources that he deem[ed] necessary for Rastafarian Religious Community" (Claim 3). Plaintiff also asserts that Warden Sivley violated his "right to proselytize and celebrate religious holiday free of disruption and repercussions by staff and admininstration" (Claim 4).

It is well established that criminals do not "forfeit all constitutional protections" upon conviction. *Bell v. Wolfish*, 441 U.S 520, 545 (1979). Prisoners retain their First Amendment rights, including the right to the free exercise of religion, to the extent that these rights are not inconsistent with their status as prisoners or with the legitimate penological objectives of the corrections system. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Prison regulations or practices that infringe on the constitutional rights of prisoners are judged by their reasonableness, a less stringent standard than that ordinarily applied to claims made outside of the prison context. *See, e.g., Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977); *Salaam v. Lockhart*, 905 F.2d 1168, 1170 (8th Cir. 1990).

Plaintiff states that the Rastafarian Religious Community arranged, with the approval of the prison administration, to have a guest speaker on July 27, 1996. Although the speaker cancelled "days" before the scheduled appearance, Chaplain Wright did not inform the Rastafarian inmates of this fact. The inmates therefore went to the scheduled event, only to be told that the

speaker had canceled. Plaintiff was obviously very disappointed over this incident; however, he does not allege that Chaplain Wright was in any way responsible for the speaker's cancellation. Under these circumstances, it cannot be said that the incident amounts to an infringement upon plaintiff's right to practice his religion. Because Claim 2 fails to state a claim upon which relief can be granted, it is due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1).

Plaintiff's allegations that Chaplain Wright has "constantly denied" requests to purchase Rastafarian tapes and his allegations concerning officers' attendance of Rastafarian services also fail to state a claim of interference with religious freedom. While the First Amendment preserves to prison inmates the right to practice their religion subject to reasonable limitations by prison authorities, *see O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), it does not require prison officials to expend public funds for the purchase of religious materials to be used by the prisoners. Such a use of public money arguably would violate the Anti-Establishment Clause of the First Amendment.

Also, the right to practice religion in prison is not without limits reasonably necessary for security and other legitimate institutional goals. Insofar as plaintiff alleges only that officers were assigned to be present during Rastafarian religious ceremonies, he has not alleged that they interfered with the practice of his religion. Prison officials had a duty to take reasonable steps to assure that order is maintained, and posting guards at any large gathering of inmates, whether a religious ceremony or not, is nothing more than such a reasonable step.

It did not unduly infringe on the ceremony itself, nor does plaintiff allege that it prevented him in any way from expressing and practicing his religion. Thus, claims 3 and 4 are due to be dismissed for failure to state for which relief can be granted.

Interference With Mail

Plaintiff alleges that defendants "J.L. Sivley, F.C.I. Talladega staff and administration [hereinafter "the FCI Talladega defendants"] deliberately withheld non-subversive African American magazines (EMERGE) from [him]" (Claim 7) and that these defendants "deliberately delayed and withheld mail correspondence of family friends, and co-defendant Dayanda Simpson from [him]" (Claim 8).

It is clear that prison inmates "retain those First Amendment rights of speech 'not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system.' " *Hudson v. Palmer*, 468 U.S 517, 523 (1984) (*quoting Pell v. Procunier*, 417 U.S. 817, 822 (1974)). Subject to some limitations, prisoners have a First Amendment right to engage in personal correspondence with persons outside prison. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 417-18 (1974); *McNamara v. Moody*, 606 F.2d 621, 623 (5th Cir. 1979). Plaintiff's allegations, however, fail to state a claim upon which relief can be granted.

It does not appear that plaintiff had any difficulty receiving his mail while at FCI Talladega until he was placed in administrative detention in October 1996. Even then, his only complaint concerning correspondence is

that letters from his friends and family were "continuously received unusually late," which may have been "two weeks or more after the postmarked date." He also complains that he did not receive five issues of EMERGE magazine. Plaintiff does not, however, allege that he asked any FCI Talladega personnel about this problem. Nor does he allege that any of the named FCI Talladega defendants were responsible in any way for his receiving his correspondence late or for the five copies of EMERGE that he did not receive. It appears that several of the magazine copies would have arrived after plaintiff's transfer to the Atlanta facilities. Plaintiff does not allege that he requested any of the named defendants to forward those copies to him. Plaintiff has simply failed to demonstrate that any of the six named FCI Talladega defendants – Warden Sivley, Associate Warden Meeks, Unit Manager Elston, Counselor Moses, Case Manager Gellner, or Chaplain Wright – violated his First Amendment rights concerning mail. Claim 7 and Claim 8 are therefore due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1).

Retaliation

Plaintiff sets forth two retaliation claims. In Claim 9, he asserts that "[d]efendants of F.C.I. Talladega, U.S. Marshall Service, and U.S.P. Atlanta staff and administration deliberately punished [him] by holding [him] in confinement at U.S.P. Atlanta for an extended period of time because of [his] political and religious views." In Claim 21, he asserts that the FCI Talladega defendants "deliberately attemp[ed] to transfer [him] because of [his] religious and political ideology."

It is clear that a convicted prisoner has no constitutional right to be incarcerated in any particular institution. *Montayne v. Haymes*, 427 U.S. 236, 242-43 (1976); *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). It is well settled, however, that "an act in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 [and *Bivens*] even if the act, when taken for different reasons, would have been proper." *Howland v. Kilquist*, 833 F.2d 639, 644 (7th Cir. 1987). Thus, "[a] prisoner may not be transferred in retaliation for the exercise of a constitutional right." *Ponchik v. Bogan*, 929 F.2d 419, 420 (8th Cir. 1991); *accord Frazier v. Dubois*, 922 F.2d 560, 561-62 (10th Cir. 1990).

However, "[c]laims alleging retaliation must be factual and mere conclusory allegations of unconstitutional retaliation will not suffice." *Adams v. James*, 797 F. Supp. 940, 947 (M.D. Fla.). "Recognizing that the ultimate fact of retaliation for the exercise of a constitutionally protected right rarely can be supported with direct evidence of intent that can be pleaded in a complaint, courts have found sufficient complaints that allege a chronology of events from which retaliation may be inferred." *Benson v. Cadey*, 761 F.2d 335, 342 (7th Cir. 1985). *See also Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994); *Geder v. Godinez*, 875 F. Supp. 1334, 1338 (N.D. Ill. 1995).

Although plaintiff's allegations against FCI Talladega Warden Sivley, Associate Warden Meeks, and Chaplain Wright describe a chronology from which, superficially, retaliation might be inferred, his own complaint affirmatively refutes any causal link between his transfer and his religious activities. He states that he began conducting Rastafarian services at FCI Talladega in July 1996, and

that he was instrumental in organizing The Holy Day of Atonement celebration in October 1996. He was transferred in November 1996, but he alleges he was transferred in order to make a court appearance in Atlanta in connection with his appeal. (*See* Complaint at p.21, paragraph 12.) While it is clear that these three defendants were aware of plaintiff's religious activities, it is equally clear from plaintiff's own complaint that the reason for his transfer was not reprisal for those activities, but for him to appear in court in Atlanta. There simply is not basis for inferring that a retaliatory motive was the cause of his transfer to Atlanta when plaintiff concedes that he was needed there for a court appearance. Absent some factual basis for inferring a causal link between the alleged desire of the defendants to retaliate against him and the alleged retaliatory event (i.e., the transfer), plaintiff has failed to state a claim against these defendants.

Plaintiff's allegations also fail to establish that the remaining FCI Talladega defendants – Unit Manager Elston, Counselor Moses, and Case Manager Gellner – were even aware of his religious or political views, that they had any other reason to retaliate against him, or that they in any way "caused" his transfer. Plaintiff has therefore failed to state a retaliation claim against the defendants, and Claim 9 and Claim 21 are due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1) against the FCI Talladega defendants.

Claim 9 is also asserted against "[d]efendants . . . U.S. Marshal Service and U.S.P. Atlanta staff and administration." The specifically named defendants who appear to fit within these designations are: Henry E. Hudson, Director, United States Marshal's Service; Lyn H. Duncan,

United States Marshal, Atlanta, Georgia; and USP Atlanta Warden Willie Scott. Plaintiff has failed to set forth any facts that would establish that these three defendants were aware of his religious or political views or that they had any other reason to retaliate against plaintiff. Because Claim 9 fails to state a claim upon which relief can be granted as to defendants Hudson, Duncan, and Scott, that claim is due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1) as to those three defendants.

Conditions Of Confinement

In Claims 10, 11, and 12, plaintiff complains of the conditions under which he was confined in the Atlanta City Detention Center. He asserts that the conditions at the Atlanta City Detention Center were "deplorable" and "wholly unfit for human habitation" (Claim 10), that he was denied a nutritionally adequate religious diet (Claim 11); and that he was not provided with a smoke-free environment (Claim 12). These claims are asserted against "[d]efendants U.S. Marshal Service and Atlanta City Detention Center staff and administration." The specifically named defendants who appear to fit within these designations are: Henry E. Hudson, Director, United States Marshal's Service; Lyn H. Duncan, United States Marshal, Atlanta, Georgia; Tom Pocock, Director, Atlanta City Detention Center; William Campbell, Mayor, Atlanta, Georgia; and Beverly Harvard, Chief, City of Atlanta, Georgia.

The court believes that venue for the resolution of these claims is not properly in this court. Claims relating to the conditions under which plaintiff was confined in

Atlanta, or the manner in which he was treated there, are factually and legally distinct from the claims he makes against the Staff at FCI Talladega, involving different people, institutions, and covering a different time span. None of these defendants can be brought before this court on those claims as none of them reside in this district nor did the acts complained of happen here. *See* 28 U.S.C. § 1391(b) (an action grounded on federal-question jurisdiction must be brought in the district in which at least one of the defendants resides or where a substantial part of the events underlying the action occurred). Although plaintiff attempts to allege a conspiracy among these defendants and the FCI Talladega defendants, he has failed to set forth specific factual allegations from which one may infer the existence of a conspiratorial agreement. The existence of a conspiracy must be alleged with clear and specific facts. *Fullman v. Graddick*, 739 F.2d 553 (11th Cir. 1984). Thus, the allegations relating to his treatment in Atlanta are legally distinct claims which must be resolved in that federal judicial district. These claims, therefore, should be severed and transferred to the Northern District of Georgia.

Denial of Equal Protection – Telephone Access

Plaintiff claims that the FCI Talladega defendants have "deliberately showed bias and favoritism by allowing other inmate[s] [to have] inmate to inmate phone privileges," while denying such privileges to him (Claim 22). He alleges that he is not permitted to telephone his "girl friend/co-defendant" who is incarcerated at a federal correctional institution in Bryan, Texas, while inmate Clovis Marietta is permitted to telephone his girlfriend

who is incarcerated at the same Texas institution. Plaintiff is again raising an equal protection claim.[7] In this instance, however, he has failed to state a claim upon which relief can be granted.

"To prove an equal protection claim, [a prisoner] must show treatment that was invidiously dissimilar from that accorded other inmates, with no rational basis existing for the difference in treatment." *Flittie v. Solem*, 827 F.2d 276, 281 (8th Cir. 1987). *See also Clark v. Groose*, 36 F.3d 770, 772 (8th Cir. 1994), *cert. denied*, 514 U.S. 1018 (1995). The equal protection clause has long been limited, however, to instances of purposeful or intentional discrimination rather than erroneous or even arbitrary administration of authority. *See Snowden v. Hughes*, 321 U.S. 1, 8 (1944). "Absent any allegation of a discriminatory purpose, a mere failure of those who administer the law to treat equally all persons who violate the law does not constitute a denial of the constitutional right to equal protection." *Harrington v. United States*, 673 F.2d 7, 11 (1st Cir. 1982) (citations omitted). *See also E & T Realty v. Strickland*, 830 F.2d 1107 (11th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988).

Plaintiff has failed to allege any facts that would establish that any of the named FCI Talladega defendants have acted with a discriminatory purpose in denying him telephone calls to his "girlfriend/co-defendant" who is incarcerated in another institution. Even assuming that some inmates have been allowed phone privileges he

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[7] It is clear that plaintiff is not complaining generally that he has been denied telephone privileges.

does not enjoy, he had not alleged any invidious or discriminatory basis for his treatment. Claim 22 is therefore due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1).

Visitation

Plaintiff claims that the FCI Talladega defendants deliberately removed [his] family and friend from [the] computer visiting list, thereby denying [him] visiting privileges" (Claim 26) and that his family and friends were "deliberately harassed and delayed . . . during the course of their visit" (Claim 27).

"A convicted prisoner has no absolute constitutional right to visitation, such privilege being subject to the discretion of prison authorities, provided the visitation policies of the prison meet legitimate penological objectives." *Evans v. Johnson*, 808 F.2d 1427, 1428 (11th Cir. 1987). Plaintiff alleges that he turned in a visiting list to Counselor Moses in August 1996 and that Moses verbally approved the individuals on the list. However, when the individuals attempted to visit plaintiff that same month, "they were denied entrance saying they were not in the computer." Plaintiff also states that, on May 27, 1997, he asked Counselor Moses for a copy of his visiting list. When Moses attempted to "pull [plaintiff] up on the computer, he was non-existent."

Plaintiff has not sufficiently stated a claim for denial of visitation against Counselor Moses, nor has he set forth any facts indicating that any of the other FCI Talladega defendants were involved in denying him visitation. At most, he alleges only that Moses was neglectful

in making sure that plaintiff's computerized visiting list was up to date. He does not allege that Moses has invidiously discriminated against him in violation of the Equal Protection Clause or that he had deprived him of a liberty or property interest in violation of the Fifth Amendment Due Process Clause. Even if he is attempting to allege either of these theories, he has not asserted any facts from which a discriminatory animus on Moses's part can be inferred, or that he acted intentionally or with deliberate indifference to stymie plaintiff's visitation privilege. More than mere negligence or inadvertence is required in order to state a constitutional claim. *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986).

Claim 27 is therefore due to be dismissed as to Warden Sivley, Associate Warden Meeks, Unit Manager Elston, Case Manager Gellner, Chaplain Wright, and Counselor Moses. The simple allegation that defendants have failed to assure that his computerized visitation list was up to date fails to state a claim of constitutional dimension.

Plaintiff does not have standing to assert the claims of the visitors who he states were "harassed for hours before [being] allowed to visit [him]." "In order to satisfy the requirements of standing, a plaintiff must allege a personal injury fairly traceable to the challenged conduct and a likelihood of redress by the requested relief." *Sims v. Department of Highway Safety and Motor Vehicles*, 862 F.2d 1449, 1458 (11th Cir.) (*citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)), *cert. denied*, 493 U.S. 815

(1989). Claim 27 is therefore due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1) for failing to state a claim upon which relief can be granted.

Access To Courts

Plaintiff claims that the FCI Talladega defendants "deliberately intimidated law clerk/jailhouse lawyer into not providing legal assistance to [him] to affect present civil case" (Claim 25) and placed him "in administrative detention in an effort to limit his access to petition the courts of aforesaid abuses in present civil suit" (Claim 28). He also asserts that these defendants removed "legal documents" from him while he was in administrative detention (Claim 29).

The Supreme Court has held that the due process clause of the Fourteenth Amendment assures inmates a right of meaningful access to the courts. However, the right of access to the courts as defined in *Bounds v. Smith*, 430 U.S. 817 (1977), requires only that inmates be provided with some reasonable means by which they may bring their legal claims before the court. This can be accomplished by one of several alternatives, including the appointment of counsel, providing the assistance of other persons trained in the law, or providing access to a law library. It must be emphasized that these are all *alternative* ways of guaranteeing a prisoner's right of access to the court; they are not cumulative of one another. *See Lewis v. Casey*, 518 U.S. 343, 350-51 (1996); *Bounds v. Smith*, 430 U.S. at 830.

In addition, the Supreme Court has made it clear that, in order to prevail on a claim that his right of access

to the courts has been violated, an inmate must establish prejudice by "demonstrat[ing] that the alleged shortcoming in the library or legal assistance program [or other alternative provided] hindered his efforts to pursue a legal claim." *Lewis v. Casey*, 518 U.S. at 351. To establish such prejudice, an inmate

> might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Id. Following *Lewis v. Casey*, a "plaintiff must allege that the denial of access proximately caused some prejudice to a legal claim" in order to adequately state a denial of access to the courts claim. *Heister v. Kralik*, 981 F. Supp. 830, 840 (S.D.N.Y. 1997).

Plaintiff has failed to demonstrate, or even allege, how he was prejudiced by the lack of assistance from the "law clerk/jailhouse lawyer." He was clearly able, without such assistance, to prepare the lengthy complaint filed in this case in which he has set forth a number of claims that will survive the court's review under 28 U.S.C. § 1915A. Moreover, plaintiff has set forth no factual allegations to support his conclusory assertion that the FCI defendants "deliberately intimidated law clerk/jailhouse lawyer into not providing legal assistance to [plaintiff] to affect present civil case." The court judicially knows that there is an inmate law library located at FCI

Talladega. Plaintiff does not claim that he requested at any time to use the law library and that his request was denied or that he did not have access to the law library for any other reason or that it was not adequate for his purposes. As noted above, any one of the alternative methods of providing access to the courts is sufficient, it is not necessary that an inmate be provided with access to both a law library and an inmate law clerk.

Plaintiff has also failed to allege how he was prejudiced by either his placement in administrative detention or the removal of his "legal documents" while he was in administrative detention. Plaintiff was obviously able to prepare and file the present action, despite his placement in administrative detention. He has not described the legal documents that were taken from him, nor has he explained how they were necessary to any case he had pending in any court. It is noted that plaintiff has attached as exhibits to his complaint some nineteen (19) documents. He has not identified any action, appeal, or other proceeding that was dismissed or compromised as a result of these events. Because plaintiff has failed to allege how he was prejudiced by either the lack of assistance from the "law clerk/jailhouse lawyer," his placement in administrative detention, or the removal of his "legal documents," he has failed to adequately allege a claim of denial of access to the courts. *See Heister v. Kralik*, 981 F. Supp. at 840. Consequently, Claim 25, Claim 28, and, to the extent that it is construed as an access-to-courts claim, Claim 29 fail to state a claim upon which

relief can be granted, and the claims are due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1).[8]

Deprivation Of Property

Plaintiff complains that the FCI Talladega defendants "deliberately removed articles of clothing and legal documents from [him] while in administrative detention" (Claim 29). He does not, however, provide any facts to support this claim. Plaintiff states that, on October 29, 1996, during his first assignment to FCI Talladega, he was placed in administrative detention after being "summoned to the Lieutenant's office." He does not state that any property was taken from him at that time or at any time prior to his transfer to USP Atlanta on November 11, 1996. Later in his complaint, plaintiff states that when he returned to FCI Talladega in April 1997, he was again placed in administrative detention. Upon his release from administrative detention on April 22, 1997, he was "given

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[8] In Claim 14, plaintiff asserts that various of the defendants have conspired to deny him his right to an appeal by "placing him in administrative detention and transition." This claim is discussed below in the section entitled "Conspiracy Claims." It is also noted here, however, that plaintiff has submitted, as Exhibit J, a letter from Rise Weathersby, a staff attorney with the Federal Defender Program in Atlanta, Georgia, in which attorney Weathersby states that he has "been assigned to handle [plaintiff's] appeal." Plaintiff does not state that attorney Weathersby at any time withdrew from representing him on appeal. An inmate represented by an attorney does not also have the right to have access to a law library. *See United States v. Smith*, 907 F.2d 42 (6th Cir. 1990); *United States ex rel. George v. Lane*, 718 F.2d 226 (7th Cir. 1983); *United States v. Wilson*, 690 F.2d 1267 (9th Cir. 1982).

back all his personal property after six months." When he inspected his property, he found that all of his sweat clothes and "some personal papers" were missing.

Plaintiff has identified only the following six individuals as the FCI Talladega defendants: Warden Sivley, Associate Warden Meeks, Unit Manager Elston, Counselor Moses, Case Manager Gellner, and Chaplain Wright. Plaintiff has not set forth any facts showing that any of these individuals took any property from him upon his placement in administrative detention in October 1996, or that any of them were responsible for taking the items he later discovered missing. Again, it is not enough to allege merely that they were negligent in the handling of his property; he must allege some facts from which it might be inferred that they intentionally or with deliberate indifference deprived him of his property. *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). That he has not done. Plaintiff's has therefore failed to state a claim upon which relief can be granted and this claim is due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1).

Conspiracy Claims

In Claims 14, 15, 18, 23, 24, 34, and 35 plaintiff alleges that various of the defendants have conspired to interfere with his access to the courts (Claim 14); to interfere with his correspondence with his co-defendant (Claim 15); to cause his death (Claims 18 and 35); to place an "unwarranted management Variable on [him], thereby increasing his security level" (Claim 23); to place him on Inmate System Monitoring and withhold "personal security and

safety information" from him (Claim 24); and to cause him "physical and/or mental injury" (Claims 34 and 35). However, plaintiff has failed to set forth any facts to support his allegations that any of the defendants engaged in a conspiracy against him. Allegations of conspiracy must be specific and based upon facts rather than conclusions. *Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir. 1984). "A complaint may justifiably be dismissed because of the conclusory, vague and general nature of the allegations of conspiracy." *Id.* at 557. Because plaintiff has failed to allege any facts to support his conspiracy claims, he has failed to state claims upon which relief can be granted, and Claims 14, 15, 18, 23, 24, 34, and 35 are due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1).[9] *See Phillips v. Mashburn*, 746 F.2d 782 (11th Cir. 1984).

Even as claims asserted against individual defendants, these claims fail to state a claim for relief. For reasons already discussed, plaintiff has failed to allege how he suffered prejudice due to the alleged interference with his right of access to the courts. Restrictions on his right to correspond with his co-defendant (also a federal prisoner) were legitimate institutional security measures. *See Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (upholding ban on inmate-to-inmate mail). Similarly, all of the remaining complaints deal with nothing more than ordinary institutional monitoring and management of prisoners, and do not involve the violation of any of his constitutional rights. Thus, these claims

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[9] As discussed below, Claims 18 and 35 are also due to be dismissed as frivolous.

too are due to be dismissed for failure to state a claim for relief.

Claims 13, 30, 32, and 33

Plaintiff claims that "[defendants] of U.S. Marshal Service, U.S.P. Atlanta, Atlanta City Detention Center, and F.C.I. Talladega staff and administration abused the use of the confidential informant program to frustrate [sic] a criminal act against and to Plaintiff" (Claim 13); that the FCI defendants "deliberately called Federal Aviation Administration in an attempt to have [his] Airframe and Powerplant Certificate revoked" (Claim 30); that "[d]efendants at F.C.I. Talladege, U.S.P. Atlanta, U.S. Marshal Service, and Atlanta City Detention Center staff and administration ha[ve] caused present and future paranoia to [him] of all prison staff, administration, and inmates [sic]" (Claim 32); and that the FCI defendants "xenophobic towards [him] for his religious and political idealogies" (Claim 33). Plaintiff offers no factual allegations to explain or support these claims. Vague, conclusory, and general allegations are insufficient to state a claim upon which relief under § 1093 can be granted. *See Fullman v. Graddick*, 739 F.2d 553, 556-57 (11th Cir. 1984). Claims 13, 30, 32, and 33 are therefore due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1).

Alternatively, the court also finds these claims to be frivolous because they are based on fantastic and delusion [sic] factual allegations. A fair reading of the complaint leaves the court with the clear conclusion that plaintiff's own paranoia has led him to string together

unrelated events to weave an elaborate but wholly delusional tapestry of imaginary threats to his safety and well-being.

Claims 5, 6, 16, 17, 18, 19, 20, 31, and 35

In *Denton v. Hernandez*, 504 U.S. 25 (1992), the Supreme Court stated:

> [A] court may dismiss a claim as factually frivolous only if the facts alleged are "clearly baseless," [*Neitzke v. Williams*, 490 U.S. 319, 327 (1989)], a category encompassing allegations that are "fanciful," *id.*, at 325, "fantastic," *id.*, at 328, and "delusional," *ibid.* As those words suggest, a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them. An in forma pauperis complaint may not be dismissed, however, simply because the court finds the plaintiff's allegations unlikely.

Denton, 504 U.S. at 32-33. Plaintiff's claims that various of the defendants attempted to physically injure or murder him by "introduc[ing] chemicals and vapors into the atmosphere surrounding "him (Claims 5 and 19) or by "introduc[ing] sedative drugs in meals and commissary food items" (Claims 6 and 20); that various of the defendants "introduced [a] psychologist to [him]" in order to "free themselves of responsibility" in the "event of a planned murder/suicide" (Claims 16 and 17); that various of the defendants have conspired to cause his death (Claims 18 and 35); and that the FCI Talladega defendants "introduced a verbal contract . . . for [his] demise" (Claim 31) certainly rise to the level of "irrational" and "wholly

incredible"[10] Consequently, Claims 5, 6, 16, 17, 18, 19, 20, 31, and 35 are due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1).

Claim 36

Plaintiff alleges that "[d]efendants at Federal Bureau of Prison, Atlanta, deliberately disregarded [his] plea for Administrative Remedy Form BP-10" (Claim 36). Plaintiff states that while in the Atlanta City Detention Center, he "wrote the B.O.P. Regional Office twice pertaining to the reason for being held in a city jail and the limited access to legal material and personal property to proceed with his appellate process." He states that he also "inquired about Administrative Remedy Form BP-10," but "his request was disregarded."

Plaintiff has named Kathleen M. Hawk, Director, Federal Bureau of Prisons, and R. Mathews, Regional Director, Federal Bureau of Prisons, as defendants. He does not, however, allege that he directed any of his correspondence specifically to either of these defendants. Plaintiff is apparently attempting to implicate defendants Hawk and Mathews through the concept of *respondeat superior*. However, "there is no doctrine of respondeat superior in *Bivens* actions." *Cronn v. Buffington*, 150 F.3d 538, 544 (5th Cir. 1998). Instead, "supervisory federal officials named in the suit may be held liable only upon

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[10] It is noted that plaintiff has recounted in his complaint a large number of incidents that he finds inexplicable or disturbing. Plaintiff does *not*, however, report a single incident in which he suffered a physical injury of any degree at the hands of any prison official, U.S. Marshal, or another inmate.

two bases. First, personal involvement in the acts causing the deprivation of a person's constitutional rights creates personal liability. . . . Second, a supervisory Official may be held liable if he implements a policy so deficient that the policy itself acts as a deprivation of constitutional rights." *Id.*

Plaintiff has failed to allege facts that would demonstrate that either defendant Hawk or defendant Mathews were in any way involved in denying him an Administrative Remedy Form BP-10. Nor has he alleged that either of these defendants implemented a policy under which he was denied such a form. But even if he could show such a thing, he has no constitutional right to a particular grievance procedure. The denial of a BP-10 did not deprive him of any right guaranteed to him by the Constitution of the United States. Because plaintiff has failed to state a claim upon which relief can be granted, this claim is due to be dismissed pursuant to 28 U.S.C. § 1915A(b)(1).

Vacation of Sentence

As noted above, as part of the relief sought, plaintiff requests that his "current prison sentence, supervised release, and all fines" be vacated. This request, however, is in the nature of habeas corpus relief and is not appropriate in a civil rights action. *See Billiteri v. United States Board of Parole*, 541 F.2d 938, 947-48 (2d Cir. 1976). Plaintiff has set forth no claims challenging his conviction such that his complaint could also be construed as a motion to vacate, set aside, or correct a sentence filed pursuant to 28 U.S.C. § 2255.

Recommendation and Notice Of Right To Object

Accordingly, for the reasons stated above, the magistrate judge RECOMMENDS that all of plaintiff's claims against all defendants be DISMISSED pursuant to U.S.C. § 1915A(b)(1) EXCEPT, the equal protection claim against Associate Warden Meeks (Claim 1) and the conditions-of-confinement claims against defendants Hudson, Duncan, Pocock, Campbell, and Harvard (Claims 10, 11, and 12). It is FURTHER RECOMMENDED that Claim 1 be referred [sic] the magistrate judge for further proceedings and that claims 10, 11, and 12 be SEVERED from this action and TRANSFERRED to the United States District Court for the Northern District of Georgia for further proceedings in that court.

Plaintiff may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal. Written objections shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. IT IS NOT NECESSARY FOR PLAINTIFF TO REPEAT HIS LEGAL ARGUMENTS. AS TO THE FACTS, IF PLAINTIFF DOES RESPOND, HE SHOULD LIMIT HIMSELF TO ADDRESSING THE STATEMENTS OF FACT CONTAINED IN THE REPORT AND RECOMMENDATION TO WHICH HE OBJECTS; THE FILING OF OBJECTIONS IS NOT A PROPER VEHICLE TO MAKE

NEW ALLEGATIONS OR PRESENT ADDITIONAL EVIDENCE.

The Clerk is DIRECTED to serve a copy of this report and recommendation upon the plaintiff.

DATED this 8th day of December, 1998.

/s/ T. Michael Putnam
T. MICHAEL PUTNAM
CHIEF MAGISTRATE JUDGE